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DEPARTMENT OF HOMELAND SECURITY

National Protection and Programs Directorate

Request for Comments (73 FR 63719) on
"Risk-Based Performance Standards Guidance"

[Docket No. DHS-2006-0073]

COMMENTS OF:

Industrial Safety Training Council
Safety Council Security Consortium

I. INTRODUCTION

The Industrial Safety Training Council ("ISTC") and the Safety Council Security Consortium ("SCSC") appreciate the opportunity to comment on the draft Department of Homeland Security ("DHS") Risk-Based Performance Standards ("RBPSs") Guidance on the Chemical Facility Anti-Terrorism Act of 2008 ("CFATS"), collectively "Draft Guidance".

The ISTC is a 501(c)3 non-profit training and educational organization located in Southeast Texas. The ISTC and thirteen other safety councils comprise the SCSC. Together, the ISTC and the SCSC operate an established, highly successful and comprehensive identification verification and background screening program for contractors, and their employees, working at over 100 chemical and refining facilities throughout Texas, the Gulf Coast, and also in New Jersey, West Virginia and several other states.

Under Section 550 of the Homeland Security Appropriations Act of 2007,¹ Congress gave DHS regulatory authority over security at high-risk chemical facilities. On April 9, 2007, DHS promulgated the CFATS interim final regulations.² CFATS established 18 RBPSs for chemical facility security, including personnel surety RBPSs. By notice published on October 27, 2008, DHS issued a request for comments on the Draft Guidance for the CFATS RBPSs. The ISTC/SCSC respectfully submits the following comments on the personnel surety RBPSs chapter contained in the Draft Guidance.

¹ Pub. L. 109-295, sec. 550.

² 6 CFR Part 27; 72 FR 17688.

II. DISCUSSION

The ISTC/SCSC recommends that the following be incorporated into the final version of the Draft Guidance:

- Add language that makes explicit that a chemical facility that is also a Maritime Transportation Security Act regulated facility must comply with the personnel surety CFATS RBPSs;
- Remove language that suggests TWIC and/or HAZMAT are an appropriate alternative to risk-based, nuanced personnel surety RBPSs that authorize varying levels of access based on the frequency and recency of criminal activity; the sensitivity of an individual's duties and responsibilities; the security needs of the particular facility; and other case-by-case factors unique to the chemical industry and specific facilities; and
- Add language that recognizes a process through which a private sector third-party may provide a chemical facility with the personnel surety security measures necessary to satisfy the CFATS RBPSs.

The Draft Guidance states that for a chemical facility to meet the RBPSs, the facility may choose and implement security measures as necessary "based on the facility's circumstances, including its tier level, security issues and risks, physical and operating environments, and other appropriate factors".³ DHS will determine whether or not the security measures implemented "achieve the requisite level of performance" required by CFATS.⁴ The ISTC/SCSC supports an approach that preserves chemical facility discretion to identify and to utilize those security measures and practices that are "tailored to the unique considerations associated with a facility".⁵ Regarding the personnel surety RBPSs, the ISTC/SCSC agrees with the principle that personnel surety should be a "key component of a successful chemical facility security program, with the level of screening commensurate with the access provided."⁶ The ISTC/SCSC, however, recommends that the following policies be incorporated into the Draft Guidance in order to improve on the personnel surety security measures implemented in chemical facilities.

A. Add language that makes explicit that a chemical facility that is also a Maritime Transportation Security Act regulated facility must comply with the personnel surety CFATS RBPSs.

Congress passed the Maritime Transportation Security Act ("MTSA") shortly following the September 11, 2001 terrorist attacks. Under MTSA, the Transportation Security Administration developed the Transportation Worker Identification Credential ("TWIC") to identify individuals that may pose a terrorist threat to our nation's ports. MTSA was not passed to handle the wide variety of security risks associated with chemical facilities that are located on a body of water. Credentialing procedures designed for the maritime sector do not address the

³ Draft Guidance p. 7.

⁴ Draft Guidance p. 8.

⁵ Draft Guidance, p. 15.

⁶ Draft Guidance, p. 71.

unique needs of the chemical industry. Chemical facilities should be regulated as chemical facilities under CFATS, subject to the CFATS personnel surety RBPSs, and not as maritime facilities under MTSA and TWIC.

Section 550 of the Homeland Security Appropriations Act requires DHS to promulgate regulations “establishing risk-based performance standards for security of chemical facilities.”⁷ Accordingly, DHS expressly adopted a regulatory approach under CFATS that increases the level of scrutiny as the level of risk increases. This risk-based, tiered approach to security reflects the fact that the working environment in chemical facilities is unique to the chemical industry. The chemical industry has already developed personnel surety best practices that are already predominantly compliant with the CFATS RBPSs, such as the ISTC/SCSC process. Regulatory solutions for a maritime environment will differ from the type of solutions necessary to address the security needs of the chemical industry.

i. Physical Access Control

Chemical facilities are, by nature, self-contained facilities with a limited number of entrances, gates, and other access points. Each of these access points are attended by at least one security person at any given time. Ports, by their nature, are open working environments, where people constantly enter and exit. Chemical facilities do not permit individuals who are not employed by the facility to enter without authorization.

ii. Personnel Work Flow

Additionally, the workforce at any single chemical facility requires greater volumes of people than in a maritime environment. Where a port may need to monitor a steady flow of workers employed at various tasks throughout a given day, a chemical facility must be able to monitor more than 5,000 employees that will attempt to enter and exit the facility at very specific times of the day. This creates a “rush hour” that any chemical facility access system must be able to manage. Ports, on the other hand, are not faced with this type of personnel influx at any one time.

iii. Chemicals

Another distinction may be seen in the type of chemicals that reach ports. These chemicals consist primarily of either finished chemical products or merely crude oil. The level of access to chemicals in a maritime environment necessitates that those handling or transporting these chemicals do not present a security risk. For these limited purposes, a port credential needs to provide only enough information to verify whether the individual holder may be present at the port location in proximity to these finished chemical products.

However, the access needs of chemical facilities must address the many different stages through which chemicals are processed. Each stage of the process involves a unique range of dangers that may include explosions, leaks/spills, thievery, or other safety concerns. A

⁷ Pub. L. 109-295, sec. 550.

credential is needed, such as those provided by the ISTC/SCSC process, which will be embedded with the relevant training records to back-up the permissible level of access to the chemicals at each of the different processing stages.

iv. Personnel Surety Methodology

Because of the unique working environment at chemical facilities, an appropriate methodology for personnel surety must ensure that security is: (1) robust, (2) nuanced, (3) responsive, (4) sensitive to employee privacy protections, and (5) inexpensive. The ISTC/SCSC process provides a robust, nuanced, responsive, privacy-sensitive and inexpensive identification verification check and background check that satisfies fully the CFATS RBPSs. In comparison, the TWIC process offers a “one-size-fits all” solution that does not address the security needs of chemical facilities.

Further, the Draft Guidance calls for a “regularly updated identification system” to satisfy the personnel surety RBPSs. The ISTC/SCSC process requires that all individuals permitted unescorted access to the secure areas of a chemical facility be subject to a comprehensive, thorough background screen, including identification verification and a criminal history record review, every two years. In contrast, TWIC is only updated once every five years.

B. Remove language that suggests TWIC and/or HAZMAT are an appropriate alternative to risk-based, nuanced personnel surety RBPSs that authorize varying levels of access based on the frequency and recency of criminal activity; the sensitivity of an individual's duties and responsibilities; the security needs of the particular facility; and other case-by-case factors unique to the chemical industry and specific facilities.

TWIC and HAZMAT⁸ were not designed for the unique security needs of the chemical industry and thus, should not serve as the standard for unescorted access to the secure areas of chemical facilities. Chemical facilities require a nuanced personnel surety process that accounts for the different areas of a chemical facility that require varying levels of security. DHS has stated that the level of screening for employees at chemical facilities should be commensurate with the level of access provided. The ISTC/SCSC screening process provides exactly this kind of nuanced approach. The ISTC/SCSC process returns a “graded”, or tiered, report which owners and operators can use to make a risk based determination of whether the individual's background is appropriate for a particular assignment. TWIC and HAZMAT merely provide pass/fail clearance for an individual to access a chemical facility, but neither credential distinguishes those individuals that may enter increasingly sensitive areas within the facility. Neither TWIC nor HAZMAT adequately provides for the personnel surety needs of chemical facilities.

Further, chemical facility owners need to employ a large number of workers, including contractors and temporary/seasonal employees, for short periods of time to handle concentrated,

⁸ Refers to an endorsement for commercial truck drivers who transport hazardous materials (HAZMAT), including explosives, issued following a background check by the U.S. Department of Transportation Pipeline and Hazardous Materials Safety Administration.

high labor activities quickly and efficiently. The ISTC/SCSC process provides timely results, sometimes within a matter of hours and always within a matter of days, which is far timelier than TWIC or HAZMAT. Delays in credentialing workers can be costly in the chemical industry, which is characterized by high turnover in the workforce and is susceptible to labor shortages.

C. Add language that recognizes a process through which a private sector third-party may provide a chemical facility with the personnel surety security measures to satisfy the CFATS RBPSs.

The Draft Guidance permits chemical facilities the discretion to choose and implement security measures, which could include products and services provided by a private sector third-party. A DHS determination that a particular entity is able to provide personnel surety security measures that achieve the level of security required under the CFATS RBPSs would be beneficial to both the chemical facilities and DHS. The Guidance Document recognizes that at least one aspect of personnel surety, the background check, involves “acquiring information on an individual through third-party services, government organizations, and private individuals to make a ‘suitability determination’ for the future actions based upon past actions.”⁹

Chemical facilities should be able to designate in their Site Security Plans an approved private sector third-party to provide for the facility’s personnel surety security needs, not just background checks. Many chemical facilities are not prepared to handle “the potential sensitivity of the information uncovered” during a background check, which “are subject to a unique set of laws and regulations to protect employees and consumers in the event of misuse of data or fraud.”¹⁰ DHS recognition of a private sector third party that specializes in compliance with the Fair Credit Reporting Act (FCRA) and other applicable federal and state laws would allow participating chemical facilities to preserve valuable resources that would otherwise be devoted toward separately and repetitively submitting the same personnel surety security measures for DHS approval. DHS would also benefit from making a single determination that a particular provider satisfies the personnel surety RBPSs rather than devoting administrative resources to making multiple determinations to approve the same process at separate chemical facilities. DHS resources would also be conserved when the time came to perform necessary audits and evaluations of the personnel security measures in use by the regulated community.

The ISTC/SCSC process meets each element of the personnel surety RBPSs. The ISTC/SCSC is fully FCRA-compliant. The ISTC/SCSC verifies and validates the identity of employees. The ISTC/SCSC process checks criminal history records and does so in a robust and comprehensive way. The ISTC/SCSC process has the ability to verify and validate contractor employees’ legal authority to work. The ISTC/SCSC process is already designed to identify people with terrorist ties by checking names against the OFAC list.

With regard to the Terrorist Screening Database, the ISTC/SCSC has already requested the opportunity to work with the Assistant Secretary and others at DHS to enhance the ISTC/SCSC process’ ability to check for terrorist ties. DHS has indicated that it will, “designate

⁹ Draft Guidance p. 164 (emphasis added).

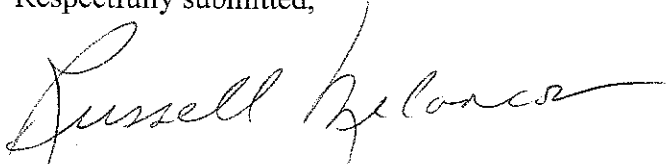
¹⁰ See Draft Guidance p. 164.

a secure portal or other method for the submission of application data for each employee or contractor for whom a TSDB check is required in the SSP.” ISTC/SCSC looks forward to working with DHS to incorporate this step into the existing ISTC/SCSC process.

III. CONCLUSION

We appreciate your consideration of the comments by the ISTC and the SCSC as you finalize the Draft Guidance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Russell Melancon Jr.", with a long, sweeping horizontal line extending to the right.

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